



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

INDIVIDUALISM AND REALISM

GASTON GAVET

Professor of Law, University of Paris, France

According to the school of "Realism," the French belief in the natural rights of man and of nations has been dissipated. For the second time this assertion has been published abroad by one of the most competent authorities of French political science.¹

For a long time this discovery did not affect us. We felt the old faith as strong as ever in our people. They have it, to use a popular expression, "in the blood" and certainly it has been one of the moral forces against which one of the most formidable military machines of all times hurled itself with dismal failure. We cannot well allow the impression to prevail that France has recognized the fictitious and illusory character of the light by which she has so long illuminated her conscience. We wish instead to assert most positively that, in our opinion, almost every French jurist remains faithful to the old doctrine.

In any event we wish to enter a protest against the deviation which realism induces from three ideas which constitute the bases of all legal construction, namely, first, the concept of natural law; second, of the personality of the State; and third, of national sovereignty.

NATURAL LAW

We individualists begin, the world is assured, "from the *a priori* and hypothetical assertion that natural man, that is to say man considered as an isolated being separated from other men. . . ." Right here we must interrupt—where has any one seen such a situation?

Two centuries ago it was occasionally admitted, as a dogma, that civilization had an artificial character and that it had a deforming influence upon "human nature." Thereupon, to visualize this nature, philosophers invented the concept of man fallen from the clouds at a given moment and not yet having come into contact with his fellow man. With all due deference to our critic it must be said that this was not a "hypothesis." It was never supposed that these were the facts; nor was this *a priori* reasoning. It was something on the order of Wells, an effort at divination to conceive what man might be under given extraordinary circumstances. But how long could this exotic concept carry illusion? Indeed, it is alleged to carry conviction in the

¹ Duguit, *The Law and the State* (1917) 31 HARV. L. REV. 1-185.

[Professor Gavet's manuscript has been translated from the French by Professor E. M. Borchard.—Ed.]

great home of the "individualist doctrine," which contains so many distinct cases, including in reality that of our critic, Duguit; that so-called system is perhaps only a vacuum, the only one, it seems, which no longer has a disciple. It has been uninhabited for over a century, and yet it is this house that has been assaulted, to drag from it the skeleton which is represented as being ourselves!

Has man ever lived in isolation? Specialists in natural history do not doubt it. Realism, however, is certain that he never has. So far as we are concerned, we do not rely greatly on the constitutional law of the time of the cave men. Let us grant then that man has always been a social animal, and admit primitive society as a fact, but do not ascribe to us any such *formula* as "natural man, that is to say, man regarded as an isolated being." To continue our critic's discussion, it appears that in our "school" this celebrated natural man "is invested with certain prerogatives which belong to him by reason of the exalted dignity of the human person." This *formula* appears to our critic so aptly synthetic of our ideas that he reiterates it in all his works. But how did he manage to find an "individualist" who does not also believe in the rights of an animal? In any event, we are alleged to believe in the animal's right to defend, like man, his life, his mate, his little ones, his lair, his prey. And we would seem to find it not only cruel, but unjust and unlawful, if not to kill him, for that might be necessary, at least not to kill him viciously—to punish him for having defended himself. Starting from these singular premises, where does natural law lead us? To an ideal right, absolute and true to a geometrical demonstration, which man must constantly labor to approach.

Let us examine this "absolute and true to a geometrical demonstration." I admit that certain of our *formulae* may induce such a belief. To this I shall recur presently. But to be at one and the same time geometrically true and ideal, that is to say, here and now, a practical dream, is another matter. How can a jurist of standing, without wrongful intent, which is certainly not shared by our critic, ascribe to colleagues such ingenuousness?

For, after all, it is evident that legislation to be conceivable must satisfy thoroughly the needs of man. Now these needs change from country to country and from epoch to epoch; and the fact that law is ideal at this moment, here, is a logical reason why it may not be so elsewhere, or at another time. To revert to the phrase, "true to a geometrical demonstration." Some centuries ago jurists said, "*summum jus, summa injuria*"; that is to say, by way of explanation: "Driven from deduction to deduction, without the pauses dictated by good sense, juristic reasoning reaches the crown of the illegal." "Rational" law has never existed.

As a matter of fact, natural law has never appeared to us as a law which could enter as such into practical life. It is like political econ-

omy, the science of financial possibilities and of military necessities, etc., one only among the disciplines to which the legislator must defer. To believe that a statute can be made merely with law is like believing that one may build "a human habitation" merely with aesthetics or hygiene or an acquaintance with the laws of heat or light.

Let us then explain what we mean by natural law, to show what "human nature" is and what we find in it to serve as a source of legislation continually changing. Let it be borne in mind that we do not seek to legitimate individualism, which would require a complete philosophy, but simply to set forth the generating idea in order to show that in any event realism must revise its condemnation of natural law. There are already more quasi-philosophic tomes than jurists generally recognize.

Observing and comparing the beings which surround him, their physical characters and their morals, when they have any, etc., man has conceived divisions of the universe into kingdoms, *genera*, species, subspecies; and of each of these divisions has imagined a sort of type, to the point that, having in contemplation, for example, the type of oak or tiger, he not only decides that a given vegetable or animal individuality is or is not an oak or tiger, but that it is a good or bad example of the species. We consider the "nature" of a being, the totality of characteristics, physical structure, needs, etc., which, united more or less completely in one individual, classify him as a type of such being. This is a notion which can not without difficulty be applied to man. Two factors, in particular, are very serious. The first is the constant state of change he experiences. History, which does not run back very far into the centuries, shows him from one period to another very dissimilar, from the threefold physical, intellectual and moral point of view. It is thus that in man more than in any other being we find the most irreconcilable tendencies. Not only is there an abyss between primitive and civilized men, but among the latter themselves there are prodigious differences in their methods of comprehending normal relations with the rest of humanity, peace and war, the value of the plighted faith, respect due to the dignity and liberty of others, etc. And even in the individual human being we find opposing tendencies—the desire for health, the craving for strong drink, the incessant aspiration for a better life and for the line of least resistance, the attachment to life and the instinct which impels certain men to expose themselves for their fellow men or to devote their lives to art, science, etc. Now all these tendencies are equally "natural," if by that word we understand things which spring from the very constitution of man.

The first of these causes of embarrassment may practically be eliminated. However rapid indeed the transformation of man, it requires centuries to effect a notable change; and as it does not generally proceed *per saltus* the line marking his history, while in

reality curved, seems over a long period to be straight. If the jurist would not be too ambitious he may substitute for this absolute human nature, which is only fanciful, a relative and temporary human nature, measurably exact over several centuries. This is fairly satisfactory for, after all, we know man for three thousand years only.

As to the second difficulty, which results from the opposing forces in man, we have only one chance of safety against it, namely, that of these contradictory tendencies, all the product of our organization, certain among them appear since our acquaintance with man, to have become continually more attenuated across the ages, whereas others, on the contrary, have in the course of centuries become accentuated and dominant. As experience would indicate that in general an evolution begun does not suddenly terminate, we might logically conclude that according to all appearances the first among these tendencies are destined to disappear from human nature; whereas the second, on the other hand, would be attached to that human nature for centuries to come. By the same token, we might also consider as not natural those tendencies which, while not condemned directly by their history, are engaged in a compulsory struggle with others which are destined to prevail in the future.

Let it not be objected moreover that if man goes through a process of evolution, it may be under the influence not of natural forces but of civilization, for why make of civilization an artificial thing? What then are the human forces which could thus propagate civilization in immense regions, across widely separated epochs, if it did not find a fertile soil prepared? Why is "primitive" man of to-day, whether he be retarded or retrograded, visibly in process of being taken or retaken in hand by civilization? It is and can only be a natural fact; and if we insist upon speaking of "human" nature we mean civilized man. At bottom and in its quasi-philosophic form the idea is commonplace. We all feel that the truly human type, so far as we can conceive it, is chronologically not behind our epoch but ahead of it. The true man and woman are not those two hirsute animals whom we see in distant ages climbing the trees like monkeys or gliding around caverns like deer.

Therein lies our chance of success—the establishment of the fact that humanity does not proceed across the ages, here and there, now in one direction, now in another, but that it proceeds, on the contrary, toward a constant type; in other words, the existence of a directive force to the movement which incessantly controls it. Now is this fact, or is this existence, deniable? Is it disputable—and these are merely examples unnecessary to multiply—that from the physical point of view the human species by a progressive desuetude departs more and more from a given formation of the skull, which in our day, if it is occasionally encountered, is regarded as bestial; that the intellectual point of view incessantly widens and spreads, until in the mass the

faculty of abstracting and combining ideas distinctly separates them from animals; that the moral point of view stabilizes and develops from epoch to epoch a certain structure, cerebral or otherwise, which places the senses and individual wills more and more within the empire of certain ideals, of honor, kindness, humanity, etc., and by which things and acts induce repugnance or attraction, discontent or pleasure, according as they diverge from or approach these ideals.

I do not wish to say that the movement is never interrupted. It suffers regressions from time to time, but they are temporary and local, and do not prevent the establishment of the general sense of its action.

This is then the method to follow, which after all is that of Auguste Comte; namely, observation and divination by universal history, man being studied simultaneously in the past, present and future. It is toward this which men tend, a collection of qualities which they have always had and will undoubtedly conserve and which life has developed and hence will doubtless continue to develop.

Moreover, it is undeniable that we shall never succeed completely in suppressing all existing contrarieties. For example, we shall always find in man egoistic beside altruistic tendencies, the love of comfort coexisting with the devotion to duty, etc. This matters little from our special point of view. The question for us is merely to determine whether among all of these human instincts there are not some which, with a growing force and precision from epoch to epoch and more firmly established in human morality, offer solutions for the conflicts between men borrowed from what we call right and justice. Is this debatable?

Is it debatable that man for many centuries has experienced a genuine indignation against those of his fellow men who without special motive undertake to intervene in the enjoyment of his activity or inflict suffering upon him; that in his physical and moral person, or that of his wife, his children, or of those who live at his hearth under his protection, he feels himself in a kingdom in which no one may enter, and he himself moreover recognizes in principle this very inviolability in other men.

This progress of humanity toward the autonomy of the individual is constant. It proceeds from the clan, the *gens*, or similar groups, toward the simple *clientes*, and then toward the complete independence of the most humble. It proceeds from the more or less political family toward the little modern family; from the dominant power of the male, absolute head in his house, toward the equality of the sexes and the rights of children; from the collective labor amid the patriarchal group toward the independent labor of each. The steady growth of intelligence in human solidarity by the division of labor is only an increasingly clear understanding of the aid afforded to individual interest by ambient collaboration. Solidarity is individualism properly understood, and this very socialism whose incontestable practical

development is now opposed, once purified of the spoliating tendencies which exploit it, is only a reaction, often maladroitness but with a precise goal, against the forces of inequality which seem to throttle the individual.

It is likewise a steady progress which has led us toward equality, from slavery to serfdom, and then to suppression of all privileges. And even in our day, when a people have been slaves or serfs for centuries or forever, up to the point where the animal species would be domesticated forever, if once these ideas of equality and liberty are presented to their minds, we may say that in the heart of these people the days of tyranny are numbered. It may be said that this is the phraseology of the eighteenth century; on the contrary, it is merely the establishment of the cold facts.

It is also a steady progress which, from the primitive levels in which only animal wants reigned, has induced man gradually to mount in the sphere of attraction of a certain number of ideals foreign to his needs toward a vision of a certain human type, his normal type, which he seeks to attain. So that in our day, among all civilized peoples, we consider the decency of women, the honor of men, religious faith, the conscience of the child, etc., as warranting defence—like human life itself, and if need be, by slaying the aggressors. On the other hand, we do not any longer, in principle, permit killing in order to protect mere material goods, or the humiliation of human nature even in the criminal, etc.

It is likewise by spontaneous progress that man developed the aptitude of finding "just or unjust" acts or circumstances which result in a deserving act, that is, one constituting a sacrifice to one of the ideals of human conduct—not giving to the deserving person adequate satisfaction or giving reward to him who has not deserved it. This is an instinct which has been popularized by a number of significant proverbs.

The lazy person prefers disorder and squalor to a little work and thereby becomes ill: "As you make your bed, so you must lie in it."

Some lazy rustic in order to get some logs which he might easily find elsewhere fells a magnificent tree, the pride of the landscape. As it falls a branch injures him. Of course, "he didn't steal it; it belonged to him."

A government excites discord around its territory from which spring a great war and in spite of itself is drawn into it: "Who sows the wind reaps the whirlwind." Animated by a spirit at bottom the same, jurists have said for centuries: "*Ubi onus, ibi et emolumentum esse debet*"; "*Nemo alterius detrimento locupletari potest*," etc. On the basis of these ideals a theoretical law arises.

Life in society, if not a necessity, seems at least an advantage to man; but it exacts sacrifices. Thus upon the notion "*Ubi emolumen-*

tum ibi et onus" arises an organization equalizing burdens in imposts of money and of blood, etc.

Although not equal in intelligence and education men have equal claim to inviolability and will appear as having equal rights not in the government but in the existence of a good government and in the choice of a government if there is a choice; whence arises the electoral right. Two religious beliefs provided they are not anti-human are equal not necessarily in truth perhaps but in inviolability; and as they may, if neither of them wishes to force man into the position of judging which is the correct or better religion, exist together without clashing, there is liberty of conscience, though there may be but one believer in one faith and a hundred thousand in the other.

Again, there is a question of choosing a head and making allowance for all personal interest which might lead to prevarication and relying solely upon the capacity of the candidates the electors divide two to one in favor of one of the candidates. All the electors have equal interests but by the fact that two are greater than one the majority candidate is elected by the law of numbers.

In an acreage still almost deserted and uncultivated, in order to escape and enable my family to escape the sufferings of famine, I wish to clear and cultivate ground and bring in the crops. I must necessarily impair certain minor interests, interfere with the freedom of passage, destroy partly dead shrubs. The human conscience has since ages pointed out the side on which the right rests; but in a country increasingly populated, in which circulation is intense, in which the land is lacking for cultivation that industry and commerce do not replace, my domains for pleasure and hunting extend afar, and in the way of necessary roads, etc., the situation is reversed, and we have property with its attributes and restrictions varying from age to age and country to country.

Therefore if our sentiments of law and justice are natural, there is a natural law. Whether they come to us from external sources, as has been maintained, we seek to find in them the hereditary product of the sentiment of social utility. This is not possible, for they are and have always been too often in contradiction with it, particularly in the spirit of the masses, and it is they which make heredity. During antiquity and the middle ages and a great part of modern times there was a belief in the social necessity of slavery, and yet slavery has disappeared. Throughout all antiquity and the middle ages there was a belief in the necessity of cruel punishment. Even nowadays certain malefactors, left to the crowd, would perish in abominable tortures, and yet penal legislation has continuously progressed toward the suppression of degrading punishment and of suffering which exceeds the needs of example. Thus, inexorably, we come to the question: why does this seem to us to be right and just, like similar

questions as to the beautiful and the good. The answer is: because that is the way we are made; it lies in our nature. And we need not even inquire of ourselves whether these utterances of our conscience respond to objective reality. If, instead of believing my eyes which point out before my feet a dangerous precipice, I suffer the terrors of the sensation of falling and of physical suffering to follow, what does it matter to me whether that precipice is or is not an external reality; and if, not believing in right and in justice, some one attacks my liberty and causes me avoidable suffering, are the needs of my nature any the less violated?

Realism imagines that it has found a universal rule of law in a universal fact, namely, the human solidarity, alone competent to diminish the sufferings of our kind and alone worthy of being practiced and developed. Its adherents are deceived, because from a fact a rule of conduct will never be deduced. A fact of itself is neither good nor bad, and indirectly Professor Duguit recognizes this when he says:

"Co-operation in social solidarity appears to us as a fact whose concept is a spring or source of action *in consequence of* the constant aspiration of man for life, that is for the diminution of individual suffering."²

But the source of action is this very inspiration and Duguit thus enters the group of "naturalists" with whom he thought of breaking. And how does he conceive of human nature?

"Everything we may say on the uncertainty of the notion of happiness, does not demonstrate that the *only source* of human activity is not the search for the least evil. Solidarity invites man to develop to the maximum his individuality in all its forms but at the same time to respect the individual activity of others; for, every attack upon the free development of the activity of a single person reacts upon the others; it invites the search for happiness or the least evil for himself and for others, for the ills of some necessarily interfere with the others."³

This then is the secret of all the devotions, of so many accepted holocausts. This is "the sole source of human activity"!

To this realism of restriction we prefer the integral realism of individualism which seeks to take account of all that it observes in human nature; and we do not renounce at all, whatever may have been said, the different ideals which we find in it. We remain believers in the natural and imprescriptible rights of man and, therefore, in the law of nations.

² 1 Duguit, *L'Etat, le droit objectif et la loi positive* (1901) 50.

³ *Ibid.*, 1.

MORAL PERSONALITY OF THE STATE

Duguit writes :

"With certain rare exceptions all modern theories of the State and of public law rest upon the notion of the personality of the State, on the notion of the State conceived as the personification of all its inhabitants. Sometimes the State may be seen exercising a will, the collective will of that moral person of which Bluntschli speaks: the metaphysical theory of the State which proceeds directly from Jean Jacques Rousseau. Sometimes the State is seen as the organized collectivity, as a biological reality living as an individual, a vast organism of which the individuals are component cells, subject to the laws which govern the birth, development and death of every organism. Sometimes the State is conceived at one and the same time as an organism and as having a will, the organism being the support of the will. Again, finally, we affirm the collective personality of the State without explaining its metaphysical or organic character. *All these doctrines, whatever be the authority and ingeniousness of their defenders, are only hypotheses and fictions*, when they do not end in a vicious circle."

The jurists of the traditional school "see in law only the relation of two subjects of law, of two persons. We must then create these subjects of law when in fact they do not exist, and we conceive the personality of the State." But for those who do not wish to be deluded by fictions, "men who have common needs, who have diverse aptitudes, who exchange services, . . . of whom some are stronger than others and of whom the stronger have always imposed constraint upon the weaker . . . these are the facts. Outside of this everything is only fiction." "There is no society except through the individual." "Jellinek is obliged to recognize that the personality of collectivities is a pure legal concept responding to no objective reality, a form of synthesis necessary to our conscience, but that men are always necessarily the substratum of the corporation."

Is all this true? First, is it true that there is nothing real in the State beyond individuals? Second, is it true that the personality of the State is a product of the imagination invented to permit the ascription of rights to it?

First, that men are the "substratum" of the corporation, that there is no society except through the individual, I readily concede. It would seem at bottom to be a bold thesis, since Jellinek only admits it reluctantly and under compulsion. We are only the prouder for having always admitted it instinctively; but it remains to be determined whether the State is a "corporation."

Let us suppose, and the supposition is not quite visionary, that a capitalist takes possession of a certain African region or other, installs authorities there and an armed force and issues laws and regulations, although into this territory come only nomadic merchants not con-

stituting a "corporation." There would thus be simultaneously a system imposing a reign of order over a portion of the globe and perfectly fit for recognition as a State by other powers. Thus, the State appears in this case not as a certain group of men in which the stronger dominate the weaker but a certain collection of institutions and of forces organized for the use of those who wish in this corner of the globe to profit by the order which has been brought there. We recognize freely that this does not correspond to the habitual type, and we ask nothing better than to include a population as among the normal elements of the State. All that we desire to demonstrate is that its essence is not a collection of individuals but an organism designed for a collective "life." Can it be an "objective reality" without being composed of individuals? Why not? There cannot be any question of the State having any analogy to this singular being—perhaps without body, feet or head, but with "volitions," sentiments, etc., of which it is sought to attribute to the individualists the fictitious if unflattering paternity. For Duguit, who admits neither substances nor forces, human individualities themselves—thus admitting that there individualities may exist—can only be systems of phenomena, interdetermining each other, systems conceived as distinct from those which form other things. We ourselves do not believe in a substance for the State; but we believe in "forces" because we feel certain forces which are ourselves and we feel also that they meet outside of ourselves with certain opposition which is not of the order of material things. The question for us is to determine whether in the reality which is called collective life there is only a sum of individual lives in juxtaposition, as our critic puts it, or whether we encounter in it phenomena and forces foreign to individual lives. The results which we shall now point out are not new, but they are none the less conclusive.

In the State property is consecrated to the use of all the inhabitants or to the performance of public service or to the production of resources required by the community. Everywhere and always, whether or not one have the precise notion of moral personality and dominion they are subject in fact to a regime which can hardly be said to be private property in juxtaposition or even indivisible, some taken out of individual enjoyment, others dedicated to the use of all persons even of persons foreign to the group. No one disposes of these things, be it of the smallest part, as his own. It does not enter into testamentary or intestate succession. If it were necessary to recognize in the members of the group a power of ownership—it matters little whether this is a right or a social function—it would be at the most—as opposed to individual property brought into the group—a life interest and given, curiously, not merely to the individuals who composed the group at the moment it was acquired and their heirs, but also to whosoever is born or enters into the group subse-

quently, just as this power is withdrawn from those who depart from the group.

Debts are contracted for the collective needs of the members of the community. They weigh not only upon those individuals who constituted the community when the debt was contracted but on subsequent generations, often indeed principally upon the latter.

Laws are useful perhaps—accepting, by way of hypothesis, the validity of the Duguit *formula*—as details of the “rule,” but in any event even thus conceived they must be formulated by those who have, in fact, the function of formulating them and are rendered efficient only by virtue of thus being drafted. In fact they are nothing but the words of legislators. Whether or not conforming to the “rule” we find them observed in general for a long time after the death of the “strong men” who issued them, just as if they existed not as legislating individuals but as an immortal legislator.

Vast administrations, enormous public services operate in order to create or develop order, security, general wealth, education, human progress, national influence abroad, etc., administering the interests of the group which are by no means for the individuals of to-day, the sum total of their material or moral, or of their present or future interests. They are like machines of a gigantic workshop. The comparison may be found bad and we may be told that these alleged machines are made neither of wood nor of metal but of human beings and that in their interrelation we must see nothing but interplay of individual activities. This is undoubtedly true; but these individuals do not act voluntarily isolated and autonomous. They act in groups, in “personnels” having their discipline, regulations and traditions. The legislative personnel itself does not escape and cannot entirely escape the force of existing institutions; they are stronger than the “strong men.” And these personnels are accustomed to the dual idea that they serve not individuals, however numerous, but an ancient community several centuries old destined doubtless to live for centuries to come, and that to serve this community they have a privilege and duty to impose on the members of the group a group discipline, money sacrifices, the sacrifice of life even, if necessary; the works to which they are consecrated and which bind all citizens have an intersecular constancy to which no private work can aspire. In considering these works we have a very clear sensation that they doubtless build out our life somewhat, but still more a life infinitely more powerful, which will be prolonged for a long period after ours and in the course of which we are like the leaves which float upon the stream.

In this spectacle of individuals living “socially” as Duguit says, we see people living their lives as married persons, parents, owners of property, capitalists, merchants, wage earners, etc. The “solidarity” which unites them does not deprive them of their individualism which

is strengthened by the egoistic interest which each finds in the augmentation of his personal profit by the co-ordination of his work with the work of another. If now we regard them as living their lives as citizens the scene changes. In that existence which they do not make for themselves but receive from external sources they are endowed with another solidarity, which at bottom has nothing in common with the first. It consists in the fact that they must all live in the same ambient, protected from their cradle by the same institutions, receiving the same benefits but yoked also to the same constant works, which are not their own.

We are told: here are the facts: men who have common needs, who have diverse aptitudes, who exchange services, of whom some are stronger than others and of whom the stronger have always imposed a constraint upon the weaker; outside of that everything is only fiction. Whereupon we would answer: The fact is that forces divide men into peoples and that these forces many of which, climatic, economic, etc., all doubtless having their point of leverage in human nature, are outside of any human will. The fact is that in every people strong and weak disappear from life in a few years, that the constraint exercised by the one group upon the others is nevertheless constant and derives from a permanent element, a whole collection of institutions which successive generations of "strong" men utilize one after the other but which existed before any of them and which survives them. The fact is that individual existences thus brought together and solidified by the perpetuity of these powers which take them successively and make them continue the same intersecular works, form altogether continuous and co-ordinated series of phenomena which have nothing in common with the other part, autonomous but ephemeral, of their individual lives. Whatever the cause, it is not by reason of a simple attitude of spirit that a nation always forms a distinctive system itself, notwithstanding the incessant change in the concrete individuals which inhabit it. This must be admitted.

What we therefore call the collective life, which, however, is not life, is even less the sum of a certain number of individual lives. They are not even individual interests which are served by institutions whose ensemble constitutes the State. And I find myself with Duguit in the presence of phenomena perfectly real, of which many have nothing in common with those of which the life of individuals consists. That there is nothing more, that there is no collective soul, that there is no substance, may be admitted without quibble; but that the figurative expression of life of the State does not represent a fact, corresponds to nothing; that that could have been written under the pretext of realism does not do honor to realism. "There is no society except through the individual," writes our sociologist. "There are only individuals living in society." Unfortunate men those who but very recently suffered and died for our countries and to whom you would

have said: groups have no objective reality. They are chimeras, conceptions of publicists. Reassure yourselves. Your instinct is the right one. You are offering your lives in order that the system of political, social and moral forces may survive which has taken hold of you since your birth, which has made you largely what you are, which has given your lives the milieu that rightly or wrongly you love not for yourself but for it.

Has this composite and realistic individuality which is a state corporate or moral personality? I admit that here the error of our critics is explainable by our traditional legal terminology which is inaccurate.

Strictly and correctly speaking, the "moral" world is that of the conception and imagination; "moral personality," if we would not play with words, consists then for any particular individual who is not really a person, in being more or less faithfully conceived or imagined as such. We would not perhaps expressly endow it with body, head, arms and legs but we freely attribute to it will, sentiments, and a kind of human life. Man is drawn by a national disposition toward these creations, and when it concerns his country, painter, sculptor, writer, peasant or artisan, he readily endows it with human form, naturally feminine, a sort of maternity, affection and needs. On all the system of real phenomena which constitute the "collective life" of its citizens past, present and future, he thus engrafts a complete life of fiction. He does this out of poetry, healthy and strong and suggested by events, but still poetry. This creation in the moral world, that is to say in the world of ideas and imagination, can only be the work of that which creates ideas and images, that is to say of the mind. And for that work it has no need of being aided by the law. The Church is for all or nearly all spirits a moral person, loved or detested, but certainly living a sort of powerful superhuman or at least quasi-human life, and nevertheless our law ignores it. Only, and it is here that the amphibology of words commences, we have also the habit of calling "legal personality" the aptitude for rights, of designating more specially as "moral personality" that same aptitude so far as possessed by non-human individualities. This is then a second sense of the expression, for if moral personality correctly named is the work of the spirit, legal personality is and can only be the work of the law.

That these two notions, taken by themselves, are distinct I had not supposed anyone would deny. The only possible question is to determine whether there is not a certain connection between them. The first of the two "personalities" exists very strongly in the second as we have seen in the case of the Church. Is this true reciprocally, or must it be admitted on the contrary that the aptitude for rights cannot exist without human personality, real or at least fictitious? This is the idea which Duguit ascribes to us when he says: "There

must be created a subject of rights and thus one conceives the personality of the State." What is a right in positive law? The faculty given by the law to certain individualities to use arms which it offers them to obtain against certain resistance an obligation due, or the maintenance of a certain state of things or the reestablishment of that state if it has been destroyed.⁴

It is in endowing man with a certain number of these faculties that the law permits him, for example, to conserve for himself the fruit of his labors, to leave it to his family, to exchange it for another's products, that is to say, to create for himself the resources necessary for the maintenance of life. "Legal personality" is only the aptitude to have these faculties, the privilege that consists in being included among the individualities in which the law is interested and to which it wishes to assure the resources necessary or useful for human life.

What are these individualities? Man is quite naturally in the first rank, but if the law is confronted with any non-human individuality whatever which in the human interest it is desirable to maintain, for example, a hospital, a library, a historical monument, or a beautiful country side, and that the simplest means be to assure it the same resources that serve human existence, why should not the law take it into consideration? Why should the law not give it, along with its agents, the faculty of causing through them the predominance of a certain state of things, and of giving effect to its obligations? Why must it be a "person" to have the protection of the law against hostile claims?

I recognize fully that at first glance the contrary idea is suggested by our current terminology. It is difficult to admit that words generally received do not correspond to notions generally admitted and which consequently we must not disregard. Then why do we use these names of "personality" and "moral personality" to designate the aptitude for rights? The explanation is very simple.

For a long time under the influence of those instincts of natural law of which it seems no longer good form to speak, it has been felt, at first obscurely but later more and more clearly, that laws, made to be understood for men, are in principle made for all, that all have the privilege of playing their part in human society, to enjoy in the eyes of others their dignity as men. The idea of human personality for many centuries has involved, I do not say necessarily but naturally, the idea of an adaptability for rights. And, it may be added, and reciprocally, for rights are quite naturally created for men. So that without being a kind of Siamese twins the two notions have been

⁴Duguit does not wish us to define a right as an interest rendered by the law superior to others, and I am in accord with him, for one may have not only powers and privileges but also rights, without interest properly speaking in view, for example, of the accomplishment of a duty or as the agent of another.

joined; to be a person in the eyes of the law and to have a capacity for rights appear very easily as equivalent terms. This is a fact which has numerous analogies, for example, because the power called "paternal" is not the exclusive appanage of a father is no reason for condemning the customary name "paternal."

The result is that when the law, having organized rights with respect to persons—which is quite natural—wishes them to attribute these same rights to non-human individualities it is forcibly led under penalty of useless repetition to speak of them as assimilated to persons, assimilated be it understood from the point of view of rights, of the legal situation, but not of nature. If a code, after having regulated paternal power with respect to the father, which is normal, then provides that in a given case the mother shall be like the father, we should not, I suppose, find a fiction in the change of sex. Because the law, after having attributed rights to human persons and having called that faculty "personality," then finds another individuality worthy of its protection and seeing what has been done above, attributes to it this same legal "personality," is that a reason for speaking of a fiction of *physical* human personality? If so, truly the wish is father to the thought. We perceive differences in the following three modalities or methods of existence: (1) true or human personality, the product of nature; (2) moral personality, the product of the imagination; and (3) legal personality, the product of the law created by it for entities which it wishes to protect, persons or not. To seek to cut this third personality in two and to speak of a second moral personality, as of a special legal personality, is to disturb quite gratuitously the notion of legal personality, which is one. In passing from men to entities not human it may lose some of its practical attributes rendered useless by the national force of things, as it may, for example, in passing from the male to the female and reciprocally. But, more or less comprehensive according to cases, it safeguards throughout its very nature, which consists in being *the reality of a legal aptitude*, not *the fiction of a certain physical constitution*. So much for the question from the rational point of view.

To sum up, the two notions of personality, real or moral, and of capacity for rights although bound together by a certain customary affinity are nevertheless not connected and pass easily from one to the other. To comprehend that the State has legal personality and rights it is unnecessary to assign to it a fictitious physical personality. If I do, it is through liking for the concept but without any logical necessity. I cannot perceive why the law, mistress of its gifts, cannot endow any collectivity whatever, the State or any other, with this legal personality without enshrouding it first with the mask of a pseudo-human person.

In concluding the present discussion, it does not escape us that we have just used a phrase which will draw upon us a new criticism under

pretext that the law exists by reason of the State, not the State by reason of the law. But in our opinion the law is not the product of the State any more than the State is the product of the law.

The law is a force, the most real of forces,⁵ whose action upon us is induced in part by fear inspired by the penalties of the "strong" men against violators of its rules, in part by the obscure reverential sentiment which creates in the nation a constant discipline and a certain not less obscure attachment to that which produces order and peace. It is the force which induces obedience to the rules that the competent authorities have issued from promulgated texts and certain usages.

States, and in each of them the State, are constituted at one and the same time of groups of men and of territories which forces of all kinds, ethnical, historical, geographical, economic, moral, material, etc., separate from the rest of humanity and from the terrestrial surface by subjecting them to an autonomous discipline. The law is one of these forces; it is neither posterior nor anterior to the State. It is the State, if the word is not somewhat pedantic and consubstantial. And when it imposes upon us, for example, the respect of certain bonds consecrated to the production of resources of which the community has need and also makes of the latter a legal person, what is the value of the question of a so-called anteriority of the State to the law or of the law to the State?

(To be continued.)

⁵ The realists may wish to respond: "But it is you who see the force of the law in fear, reverential respect, attachment, that is to say in subjective phenomena." But this is not what we mean. These sentiments are not the force of the law but the result of our opposition to it, exactly as the subjective character of the sensation caused by contact with an electric current does not impede the objective character of the electric force itself, a force which acts even upon inanimate matter.